



Drafting Pointers for Risk Balancing in Conservation Easements

General Suggestions

- Draft defensively.
- Strive for a reasonable balance; you cannot anticipate or define everything.
- Clearly express the intentions of all parties to the easement to guide courts on interpretation.
- Avoid jargon, abbreviations, colloquialisms, terms of art or technical terms.
- Beware of common law that may construe easement language against conservation.
- Understand the politics of your jurisdiction and its influence on the judiciary.
- Include a clause that directs judges to interpret the conservation easement fully in favor of conservation in all situations, not just ambiguities, and consistent with state conservation easement enabling act.
- Avoid conflict between clauses and make explicit all assumptions.
- Explicitly address all conservation values and protected attributes.

Sample Clauses

Controlling Law and Interpretation. The interpretation and performance of this Easement shall be governed by the laws of the State of [name of state]. Any general rule of construction to the contrary notwithstanding, this Conservation Easement shall be broadly construed in favor of the Conservation Easement to effect the conservation purposes of this Conservation Easement and the policy and purpose of the [XXX] Conservation Easement Act at Title [number], Revised Statutes Annotated, Sections [number] through [number], inclusive, as amended. If any court finds that any provision in this Conservation Easement might conflict with another, an interpretation consistent with the conservation purposes of this Conservation Easement shall govern. If any court interprets that the Conservation Easement is silent, ambiguous, inconsistent or otherwise deficient on any point in dispute, an interpretation consistent with the conservation purposes of this Conservation Easement shall govern.

Costs and Fee Recovery. All reasonable fees and costs incurred by Grantee in administration, including, without limitation, investigation, negotiation, mediation, settlement or suit, of any dispute regarding this Conservation Easement, including without limitation, all fees, costs and expenses of investigation, dispute management, negotiation, mediation, settlement or suit and reasonable attorneys', experts' and consultants' fees, staff time and any fees and costs of restoration, remediation or other damage correction necessitated by any such action shall be borne by Grantor; provided, however, that if Grantor ultimately prevails in full in a judicial enforcement action, each party shall bear its own costs (optional: unless Grantee is found by a final court of competent jurisdiction to have acted in bad faith). If Grantee prevails in part, then Grantor shall be responsible for all fees and costs of both parties as set forth above.

Economic Hardship. In making this grant, Grantor has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than permitted uses and that neighboring properties may in the future be put entirely to such prohibited uses. In addition, the unprofitability of conducting or implementing any or all of the uses permitted under the terms of this Conservation Easement shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. It is the intent of both Grantor and Grantee that any such economic changes shall not be deemed to be changed conditions or a change of circumstances justifying the judicial termination, extinguishment or amendment of this Conservation Easement.

Enforcement. Grantee may make periodic inspection of all or any portion of the Protected Property to determine compliance with this Conservation Easement. Grantee shall have the right of reasonable access to the Protected Property for inspection and enforcement purposes. In the event that a Grantee becomes aware of an event or circumstance of noncompliance with this Grant, Grantee shall give notice to Grantor of such event or circumstance of noncompliance via certified mail, return receipt requested, and demand corrective action by Grantor sufficient to abate such event or circumstance of noncompliance and restore the Protected Property to its previous condition. Failure by Grantor to cause discontinuance, abatement or such other corrective action as may be demanded by Grantee within a reasonable time after receipt of notice and reasonable opportunity to take corrective action shall entitle Grantee to bring an action in a court of competent jurisdiction to enforce this Conservation Easement and to recover any damages arising from such noncompliance. The parties to this Grant specifically acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity or through administrative proceedings. Nothing in this enforcement section shall be construed as imposing a liability upon a prior owner of the Protected Property, when the event or circumstance of noncompliance occurred after said prior owner's ownership or control of the Protected Property terminated.

Forbearance. Forbearance by Grantee to exercise any of its rights under this Conservation Easement shall not be deemed or construed to be a waiver by Grantee of any of Grantee's rights under this Conservation Easement. No delay or omission by Grantee in the exercise of any right or remedy shall impair such right or remedy or be construed as a waiver.

Future Evolution. No use shall be made of the Protected Property, and no activity thereon shall be permitted, which is or is likely to become inconsistent with the Purposes of this Conservation Easement. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future technologies and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Conservation Easement or the Protected Property. Grantee, therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement, or (b) alterations in existing uses or structures, are consistent with the Purposes of this Conservation Easement.

Land and Ownership Division. The entire Protected Property described in Exhibit A may be granted, sold, exchanged, devised, gifted, transferred or otherwise conveyed in unified title as one (1) parcel only. The following are expressly prohibited: the legal or “de facto” division or subdivision of the Property, which shall include, but shall not be limited to, any subdivision, short subdivision into remainder tracts, platting, testamentary division or other process by which the Property is divided in ownership or in which legal or equitable title to different portions of the Property are held by different owners. Grantor may not indirectly divide any of the Property through the distribution of property rights among partners, shareholders or members of any legal entity, creation of a horizontal property regime, condominium, common interest community, interval or time-share ownership, partitioning among tenants-in-common, judicial partition of the Property or by any other means.

Nonwaiver. The failure or delay of the Grantee, for any reason whatsoever, to take any action required or contemplated hereunder, or to discover a violation or initiate an action to enforce this Conservation Easement or any other action, shall not constitute a waiver, laches or estoppel of its rights to do so later.

Permitted Rights for Structures, Buildings and Improvements. See the Practical Pointer regarding Tax Court cases addressing building envelopes and inconsistent permitted rights along with drafting options and considerations and a discussion of risk balancing.

Proceeds Clause. See the Practical Pointer regarding Tax Court cases interpreting the proceeds clause along with a sample clause and a discussion of risk balancing.

Purpose. In conveying the development rights, conservation easement and restrictions described herein to Grantee, it is the intent of Grantor and Grantee that the interests conveyed herein shall include all development rights except those specifically permitted to the Grantor herein and those reasonably required to carry out the permitted uses of the Protected Property as herein described. The development rights, perpetual conservation easement restrictions and public access easement hereby conveyed to Grantees consists of covenants on the part of Grantor to do or refrain from doing, severally and collectively, the various acts set forth below. The parties hereby acknowledge that the development rights, perpetual conservation easement restrictions and public access easement constitute a servitude upon and run with the land. Grantor and Grantee recognize the foregoing] resource values of the Protected Property and share the common purpose of conserving the foregoing] resource values by the conveyance of conservation restrictions and development rights to prevent the use, fragmentation or development of the Protected Property for any purpose or in any manner that would conflict with the maintenance of the foregoing] resource values. Grantee accepts such conservation restrictions, development rights and public access easement in order to conserve these values for present and future generations as the foregoing] resource values may evolve over time.

[Keep Your Amendment Clause](#)

The Alliance has long held that a modification clause in conservation easements strengthen easements and improves enforceability. A modification clause, which may include amendment, consent, waiver and other discretionary approvals, enhances the “protected in perpetuity” standard and improves the chances of perpetual easement protection. This clause (or clauses), along with well-crafted guiding principles, helps conservation organizations properly address unforeseen circumstances.

Due to a federal court decision in December 2018, it is clear that a sound amendment clause upholds conservation purposes. In the case of *Pine Mountain Preserve, LLLP v. Commissioner*, the U.S. Tax Court definitively asserted that the inclusion of an amendment clause in an easement cannot and should not be grounds for denying a deduction for an easement donation. The U.S. Court of Appeals for the 11th Circuit [affirmed](#) the Tax Court's decision on amendments in 2020. Be sure to review these [Risk Management Pointers](#) to reduce the risk of audit and help limit problems if there is an audit.

[Visit the Alliance blog to learn more about this big win](#) and how the Alliance, working with many tax and conservation experts, helped secure it. Donors and land trusts can now feel confident including a sound amendment clause in a conservation easement. Land trusts may wish to review the Amendment Principles in the 2017 [Amending Conservation Easements: Evolving Practices and Legal Principles](#) and ensure any amendment clause reflects the Amendment Principles. The Alliance specifically recommends an amendment clause "to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws." Practice 11H1 of [Land Trust Standards and Practices](#) requires land trusts holding easements to have a written policy on amendments that is consistent with the Amendment Principles.

[Eight Elements for Conservation Easement Modification](#)

Land trusts may wish to consider including the following [elements](#) for a well-drafted amendment clause. Review them with the board and outside legal counsel:

1. Perpetual duration of the easement and intent to protect conservation purposes in perpetuity.
2. Recognition that change happens over the course of time to which the land trust and the landowner may need to respond.
3. Full disclosure that nothing requires Grantor or Grantee to modify the easement deed. Vest sole discretion for *all determinations in the Grantee* (avoid use of Grantor consent or agreement).
4. Sole discretion for all determinations retained by the Grantee.
5. Incorporate the concepts embodied in all of the Amendment Principles.
6. Conforms to all of Grantee's policies in effect at the time of the amendment.
7. Any extinguishment, with the exception of *de minimis* corrections, requires approval as dictated by state law. Easements for which the donor obtained a federal income tax deduction must comply with the U.S. Tax Code.
8. Approval, waiver, discretion and consent provisions.
9. Other elements to consider with counsel.

[Avoiding an Audit](#)

If your donors or donor attorneys fear an IRS audit, consider recommending these steps:

1. Have a moderate and fully substantiated appraisal.
2. Fully substantiate the entire transaction.
3. Comply with IRS requirements by fully completing all IRS forms including signatures and attaching the required documentation.
4. Draft to demonstrate that conservation protections are paramount, not business interests.
5. Tie all decisions to protection of the conservation purposes.

Call or write to us any time:

Please call Land Trust Alliance staff to discuss any concerns you may have about donated conservation easements and IRS audit and trial tactics. Alternatives exist to manage audit risk.

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Last revised February 2, 2021